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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

NO. 75-5697

ROGER LAWRENCE WETMORE,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

RESPONSE OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Citation to Opinion Below 1

Jurisdiction 1

Questions Presented 1

Constitutional and Statutory Provisions Involved 2

Statement of Case 2

Statement of Facts 3

Reasons for Not Granting the Writ 3

The Question of Whether the Imposition of the Death Sentence Constitutes Cruel and Unusual Punishment is Insufficient Grounds for the Court to Grant Certiorari,

The Burden as to Proof of Insanity Was Not Unconstitutionally Placed Upon the Petitioner,

Mullaney v. Wilbur, Does Not Taint Any Presumptions of Malice Imputed Against Petitioner in the Trial Below. 3

Conclusion 7

TABLE OF CASES

Home Insurance Co. v. Dick, 281 U.S. 397, 74 L. Ed. 926, 50 S. Ct. 338 3

Moore v. Illinois, 408 U.S. 787, 33 L. Ed. 2d 706, 92 S. Ct. 256 3

In Re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 3

Mullaney v. Wilbur, 44 L. Ed. 2d 508 4

Morrison v. California, 291 U.S. 82, 78 L. Ed. 664, 54 S. Ct. 281 4

Leland v. Oregon, 343 U.S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002 4

Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 6

Tehan v. U.S., 382 U.S. 406, 15 L. Ed. 2d 453, 86 S. Ct. 459 6

Desist v. U.S., 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 6

Furman v. Georgia, 408 U.S. 238 2

State v. Waddell, 282 N.C. 431, 194 S. E. 2d 19 (1973) 2

State v. Hicks, 269 N.C. 762, 153 S. E. 2d 488 4

State v. Atkinson, 275 N.C. 288, 167 S.E. 2d 241 4

State v. Melvin, 341 Atlantic 2d 376 (1975) 5

State v. Willis, 63 N.C. 26 6

Statutes:

28 USC Sec. 1257 (3) 1

N.C.G.S. 14-17 2

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 287 NC 344, 215 S.E.2d 51 (1975), and is appended to petitioner's petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC Sec. 1257(3).

QUESTIONS PRESENTED

I. WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER THE PETITIONER WAS UNCONSTITUTIONALLY REQUIRED TO PROVE TO THE SATISFACTION OF THE JURY HIS DEFENSE OF INSANITY.

III. WHETHER PETITIONER WAS UNCONSTITUTIONALLY REQUIRED TO SATISFY THE JURY OF THE ABSENCE OF ANY MALICE IN REGARD TO THE HOMICIDE FOR WHICH HE WAS TRIED.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Petitioner's appeal is apparently predicated upon the eighth, and fourteenth amendments to the Constitution of the United States, which provide, inter alia:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (U.S. Const. amend. VIII).
>
> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV, § 1).

B. Additionally, petitioner's appeal also involves North Carolina General Statute 14-17 as construed by the North Carolina Supreme Court in State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973), which applied this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972):

> N. C. General Statute § 14-17. Murder in the first and second degree defined; punishment.--
>
> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.* All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

STATEMENT OF CASE

At the July, 1974 term of Rowan County, North Carolina, Superior Court, the petitioner was pursuant to G.S. 14-17, supra, tried and convicted for the February 9, 1974 first degree murder of Edwin Hall Wetmore. Petitioner thereafter appealed said conviction

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* Subsequent to this Court's decision in Furman, the North Carolina Supreme Court in State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973) declared the underlined portions above unconstitutional.

to the North Carolina Supreme Court, which, in its opinion filed June 6, 1975, affirmed petitioner's conviction and death sentence. Petitioner now seeks review in this Court upon Petition for Writ of Certiorari to review the judgment of the Supreme Court of North Carolina.

STATEMENT OF FACTS

The State-respondent adopts as its own as if fully set out herein the facts as found by the North Carolina Supreme Court at pages 346-349 of its opinion, a copy thereof which is attached to petitioner's petition as Appendix A.

ARGUMENT

THE QUESTION OF WHETHER THE IMPOSITION OF THE DEATH SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IS INSUFFICIENT GROUNDS FOR THE COURT TO GRANT CERTIORARI,

THE BURDEN AS TO PROOF OF INSANITY WAS NOT UNCONSTITUTIONALLY PLACE UPON THE PETITIONER,

MULLANEY v. WILBUR, DOES NOT TAINT ANY PRESUMPTIONS OF MALICE IMPUTED AGAINST PEITIONER IN THE TRIAL BELOW.

Petitioner's contentions as to the alleged improper burden of proof placed upon him to satisfy the jury of his defense of insanity were not raised at the trial below, were not raised on appeal to the North Carolina Supreme Court, and consequently, are not properly before this Court, and thus cannot predicate grounds for the granting of Certiorari. "A constitutional objection not made or considered below is not available in the Supreme Court of the United States." Home Insurance Co. v. Dick, 281 U.S. 397, 74 Law Ed. 926, 50 Supreme Court 338. "On Certiorari to review a State murder conviction, the United States Supreme Court can conclude that a due process claim is not properly presented for review where due process was not argued in the State courts and is raised for the first time before the Supreme Court." Moore v. Illinois, 408 U.S. 787, 33 Law Ed. 2d 706, 92 Supreme Court 256.

But even addressing the possible merits of petitioner's contentions, it is clear that he has misconstrued the conceptual foundations of In Re Winship, 397 U.S. 358, 25 Law Ed. 2d 368, 90 Supreme

Court 1068, and Mullaney v. Wilbur, 44 Law Ed. 2d 508, and there are no logical, constitutional extenuations thereof to the case at bar. Most assuredly, in North Carolina every man is presumed to be sane and to possess sufficient degree of reason to be responsible for his crimes, State v. Hicks, 269 N.C. 762, 153 S.E. 2d 488, and the burden is on the defendant to prove a defense of insanity, not however, "beyond a reasonable doubt", but merely to the "satisfaction" of the jury. State v. Atkinson, 275 N.C. 288, 167 S.E. 2d 241. Manifestly, it is well settled law that presumptions, burdens of going forward, and burdens of persuasion in criminal cases may be constitutionally placed on defendant. Morrison v. California, 291 U.S. 82, 78 Law Ed. 664, 54 Supreme Court 281. Specifically, in Leland v. Oregon, 343 U.S. 790, 96 Law Ed. 1302, 72 Supreme Court 1002, this Court was squarely presented with the alleged unconstitutionality, under the due process clause of the Fourteenth Amendment, of an Oregon statute which required, unlike any other State statute at the time, that the accused on a plea of insanity establish that defense beyond a reasonable doubt. This Court declined to strike said statute, nor to find said statute violative of any "basic standards of justice". Of course, its relevant to again note that North Carolina merely requires proof to the "satisfaction of the jury", which admittedly is quantitatively a burden of proof less than that passing constitutional muster in Leland.

The continuing validity of Leland, even in the new light of Mullaney, is borne out in the Mullaney decision itself. Thus Justice Rehnquist, in a separate opinion, to which the Chief Justice joined, noted at 44 Law Ed. 2d 523, "I see no inconsistency between that holding (In Re Winship) and the holding of Leland v. Oregon, 343 U.S. 790, 96 Law Ed. 1302, 72 Supreme Court 1002 (1952). In the latter case this Court held that there was no constitutional requirement that the State shoulder the burden of proving the sanity of the defendant."

Respondent thus submits that Winship, and Mullaney, supra, speak to the burden of proof upon essential elements of the prosecution's case, and do not therefore apply to affirmative defenses, or "confession and avoidance" defenses which themselves do not attempt to negate any aspects of the State's case. Respondent urges that the proper pronouncement upon the burden of proof of such defenses like insanity, was correctly enunciated by the Maine Supreme Court in State v. Melvin, 341 Atlantic 2nd 376, (1975), where that Court noted:

> "There is no constitutional infirmity in placing upon a criminal defendant the affirmative duty of establishing by a fair preponderance of the evidence that the unlawful act with which he is charged is a product of mental disease or mental defect."

In State of North Carolina v Johnnie B. Hankerson, decided December 18, 1975, as yet unreported, the Supreme Court of North Carolina announced that North Carolina's long standing presumptions of malice which flow from a showing of an intentional killing with a deadly weapon, which thus previously required a defendant to prove to the satisfaction of the jury that he killed in the heat of passion in order to rebut same, are impermissible under Mullaney and thus are unconstitutional under the due process clause of the Fourteenth Amendment. Respondent acknowledges that said presumptions were charged to the jury herein, and formed a part of the prosecution's case below. They did not, however, unconstituionally affect the decision below because:

In the case at bar, the trial court instructed, Record page 158, that the burden was upon the State to prove beyond a reasonable doubt, "that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind." Such a finding in practical effect absolved this defendant of any requirement to show that the killing was committed in the heat of passion. In addition, respondent urges that no constitutional error is shown since the alleged impermissible burden upon the defendant went only

to prove reducing murder in the second degree to manslaughter, but the jury herein, returned a decision of guilty of first degree murder. Thus, any charge as to any presumptions of malice obtaining from the State having shown an intentional killing with a deadly weapon constituted mere harmless error. Chapman v. California, 386 U.S. 18, 17 Law Ed. 2d 705, 87 Supreme Court 824.

Judgment herein was entered August 2, 1974, nearly a year before this Court's pronouncement in Mullaney, relied upon by the petitioner. Although Winship has been given retroactive application, Mullaney has not been so interpreted, and respondent submits, does not in fact properly lend itself to such application. Two factors which this Court has in the past utilized in determining whether a new constitutional rule is to be given retroactive application include the extent of reliance on previous decisions, and the effect on the administration of justice which retroactivity would generate. Tehan v. U. S., 382 U.S. 406, 15 Law Ed. 2d 453, 86 Supreme Court 459, and Desist v. U.S., 394 U.S. 244, 22 Law Ed 2d. 248, 89 Supreme Court 1030. Both factors preclude the application of Mullaney to the case at bar. As noted in Mullaney in footnote 20, 44 Law Ed. 2d 517, North Carolina prosecutors have applied some type of malicious presumption rule since 1868. State v. Willis, 63 N.C. 26. As far as the administration of criminal justice in North Carolina is concerned, a retroactive Mullaney would ravage and devastate the North Carolina penal system. As of June 30, 1975, there were nearly one thousand inmates in North Carolina prisons serving convictions of first or second degree murder. North Carolina State correctional statistical abstract for the second quarter of 1975. Retrial for a substantial number of these individuals, if not itself a practical impossibility, would otherwise seriously disrupt the Courts of North Carolina, as well as postponing the speedy administration of justice for those other individuals awaiting trial on other charges. Respondent therefore respectfully urges that Mullaney not be retroactively applied to this petitioner.

There exists no valid reason for the Court to grant certiorari upon the question whether the death sentence per se violates the Eighth or Fourteenth Amendments to the Constitution of the United States. This Court in the case of Fowler v. North Carolina, No. 73-7031 (October Term, 1974) granted certiorari to petitioner Jessie Thurmon Fowler to hear this identical question. Extensive briefs were submitted in that case and oral arguments were made before this Court on April 21, 1975. Reargument was scheduled for the October 1975 Term of this Court. This question, therefore, has been presented to the Court, has been accepted for hearing by the Court, oral arguments before the Court have already been made; and further arguments are to be made. Therefore, any decision in this case should be dependent on the outcome of the Fowler case, and the Petition to Grant Certiorari should be denied.

CONCLUSION

Upon the foregoing argument and authorites, the State-respondent respectfully submits that certiorari should be denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served a copy of the foregoing Writ of Certiorari upon the person indicated below by depositing a copy of the same in the United States mail, postage prepaid, addressed to the following:

Mr. Robert M. Davis
Mr. Larry G. Ford
Attorneys at Law
P. O. Box 585
Salisbury, North Carolina 28144

This the 23rd day of December, 1975.

RUFUS L. EDMISTEN
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